IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 401 of 1993

WITH

CRIMINAL APPEAL No 391 of 1993

WITH

CRIMINAL APPEAL NO 392 of 1993

WITH

CRIMINAL APPEAL NO 396 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE KSHITIJ R.VYAS
and
Hon'ble MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SALIMKHAN HAMIDKHAN PATHAN

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 401 of 1993

MR KJ SHETHNA for Petitioners No. 1-4

MR KC SHAH, APP for Respondent No. 1

2. Criminal Appeal Nos. 391, 392 and 396 of 1993
MR KC SHAH, APP for Petitioner No. 1
MR KJ SHETHNA for Respondents

CORAM : MR.JUSTICE KSHITIJ R.VYAS
and
MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 25-28/01/2002

ORAL COMMON JUDGEMENT
(Per : MR.JUSTICE AKSHAY H.MEHTA)

1. All these appeals arise from the judgment rendered by Ld. Addl. Sessions Judge, Surat dated 31/12/1992 in Sessions Case No. 130/1990. These appeals are, therefore, heard together and they are disposed of by this common judgment.

1.1. For the purpose of this judgment all the original accused are described by their names together with their original position as stated in the judgment of the trial Court, as there is some difference in their serial nos. stated in the charge framed by the trial Court and the judgment delivered by it.

2. Criminal Appeal No. 401/1993 is filed by 4 original accused, namely, Salimkhan Hamidkhan Pathan accused no.2, Abdul Samad Mahmad Mirza - accused no.3, Yakub Gulam Pathan - accused no. 7 and Hamidkhan Gulamkhan Pathan - accused no. 8 challenging the order of conviction and sentence passed against them by the Ld. trial Judge. All the aforesaid accused have been convicted for offence punishable u/S. 302 and u/S. 302 read with section 149 of the Indian Penal Code (for short 'IPC') and they have been sentenced to suffer imprisonment for life. Accused no. 2 - Salimkhan Pathan has also been convicted for offence u/S. 307 of the IPC and he has been sentenced to suffer RI for 10 years and to pay fine of Rs.200/-, in default to suffer SI for 15 days. So far the other 3 accused are concerned, they have been convicted for offence punishable u/S. 307 read with section 149 of the IPC and they have been sentenced to suffer RI for 10 years and to pay fine of Rs.200/-, in default SI for 15 days. Accused no. 2 - Salimkhan is also convicted for offence u/S. 324 of the IPC for which he has been sentenced to suffer RI for six months. The other two accused are convicted for offence u/S. 324

read with section 149 of the IPC and the same sentence has been imposed upon them. Further accused no. 2 Salimkhan and accused no. 8 - Hamidkhan are convicted for offence u/S. 323 read with section 149 of the IPC and they have been sentenced to suffer RI for 3 months, whereas accused no. 3 - Abdul Samad and accused no. 7 Yakub Gulamkhan have been convicted for offence u/S. 323 of the IPC and they have been sentenced to suffer RI for 3 months. All the four aforesaid accused have also been convicted for offences made punishable u/Ss. 143, 147 and 148 of the IPC and they have been sentenced to suffer RI for six months, RI for two years and RI for one year respectively.

2.1. So far Criminal Appeal No. 391 of 1993 is concerned, it is filed by the State of Gujarat against original accused nos. 1 - Gulam Sardar Pathan, accused no. 5 - Madinabibi, w/o. Gulam Sardar Pathan, accused no. 10 - Memunabibi, d/o. Hamidbhai and accused no. 6 - Nazmabibi, d/o. Abdul Samad Mirza challenging the order passed by the Ld. trial Judge acquitting them of offences made punishable u/Ss. 302, 307, 326, 337, 504, 147, 148 and 149 of the IPC.

2.2. Criminal Appeal No. 392 of 1993 is also filed by the State of Gujarat challenging the order of the trial Court acquitting accused no. 2 - Salimkhan Hamidkhan Pathan, accused no. 3 - Abdul Samad, accused no. 7 - Yakub Gulam Pathan and accused no. 8 - Hamidkhan Gulamkhan Pathan of the offences made punishable u/Ss. 326, 337, 504, 147, 148 and 149 of the IPC.

2.3. Criminal Appeal No. 396 of 1993 is again filed by the State of Gujarat u/S. 377 of the Code of Criminal Procedure [for short 'Cr.P.C.'] for enhancement of sentences imposed upon accused no. 2 Salimkhan Hamidkhan Pathan, accused no. 3 - Abdul Samad Mirza, accused no. 7 - Yakub Gulamkhan Pathan and accused no. 8 - Hamidkhan Gulamkhan Pathan for various offences, details of which have already been narrated in para. 2 of this judgment.

3. Before we proceed with this judgment on its merits, we may state that original accused no. 4 Ibrahim Husain Shaikh had died during the pendency of the trial and hence trial against him had abated. Moreover, after the pronouncement of the judgment by the trial Court and during the pendency of the aforesaid Criminal Appeals before this Court, accused no. 1 - Gulam Sardar Pathan expired on 6th March, 1999, accused no. 8 Hamidkhan Gulamkhan Pathan expired on 24th February, 1998 and accused no. 9 - Salmabibi Gulam Sardar Pathan expired on

31st May, 1997. So far the latter 3 accused are concerned, necessary documents regarding their demise have been produced before us and the State of Gujarat has no dispute on that count. In view thereof, by virtue of provisions of section 394 of the Code of Criminal Procedure the present appeals qua these accused will stand abated. With the result, we are now called upon to deal with these appeals only in respect of accused no. 2 Salimkhan Hamidkhan, accused no. 3 Abdul Samad, accused no. 5 - Madinabibi, accused no. 6 Nazmabibi, accused no. 7 - Yakub Gulam and accused no. 10 - Memunabibi Pathan.

4. The unfortunate incident in which two persons, namely, Abbaskhan and Haidarkhan lost their lives and several other persons received various injuries, took place on 28th January, 1990 at village Pipodara in Surat district. Marriage of one Rabiyabibi, daughter of Yusufkhan Amirkhan was scheduled to be held on that day. The marriage party of the bridegroom had arrived at Pipodara from village Siyalaj in the morning at about 10 O'clock. At about 11.00 O'clock one Gulam, son of Sabbirbhai, teased a young girl who had come there with the marriage party of the bridegroom. As a result of that, some unpleasantness was generated, which ultimately turned into a small quarrel between the members of the marriage party and some persons or the side of Gulam. However, with the intervention of Haidarkhan and Abbaskhan, the things were pacified and the marriage ceremonies and other celebrations came to be performed peacefully. At about 3.15 to 3.30 in the afternoon the marriage party of the bridegroom started to leave Pipodara and to return to village Siyalaj alongwith bride Rabiyabibi. At that time some of the present accused, namely Yakub Gulam, Hamid Gulam, Salim Hamid, Memunabibi, etc. picked up a quarrel with members of the marriage party near the house of Yusufkhan Amirkhan i.e. father of Rabiyabibi. It appears that the quarrel turned into some physical fight involving members from both the sides, but soon thereafter the marriage party, anyhow, managed to leave village Pipodara safely. Things, however, did not calm down at Pipodara. It appears that in continuation of this incident, the accused persons turned their attack on the relatives of Rabiyabibi. Some of the accused at that time had armed themselves with weapons. Accused no. 1 - Gulam Sardar Pathan carried koyta, an agricultural implement to reap the sugarcane crop, accused no. 2 Salimkhan Hamidkhan Pathan was having knife. Accused no. 3 - Abdulsamad was having a flat iron rod used as shock absorber spring in the truck, deceased accused no. 4 Ibrahim Shaikh carried iron rod,

whereas accused no. 7 Yakub Gulam Pathan and accused no. 8 - Hamidkhan Pathan carried stick and spear respectively. The lady accused did not carry any weapon with them. These persons came in front of the house of Yusufkhan. At that time deceased Abbaskhan and Yusufkhan, uncle and father of Rabiyabibi respectively were making arrangement to return the utensils and other articles which were brought for the purpose of marriage. Both these persons were standing near Shamiyana erected just in front of the house of Yusufkhan.

4.1. On arrival, accused no. 2 - Salimkhan Pathan gave a knife blow to Abbaskhan just below the chest. He gave another blow with knife to Abbaskhan on the back side. As a result of that Abbaskhan fell down on the ground. Accused no. 8 - Hamidkhan Gulamkhan caused injury with spear to Haidarkhan on his back. Accused no. 2 Salimkhan Hamidkhan also caused injuries to Liyakat Mahmad and Mahmad Abbas and also to Idrishbhai on various parts of their bodies with knife. Accused no. 3 Abdulsamad, who was having flat iron rod with him, wielded it indiscriminately. He in particular caused injury to Liyakatkhan on his back. Accused no. 7 Yakub Gulam gave stick blows to Abbaskhan on his left hand near wrist and he also caused injuries to Idrishbhai Abbaskhan. The lady accused, namely, accused no. 5 Madinabibi Gulam Sardar, accused no. 6 - Nazmabibi Abdulsamadm accused no. 9 - Salmabibi Gulam and accused no. 10 - Memunabibi Hamidbhai also participated in this assault and gave fist and kick blows to Rajiyabibi, sister of Idrishbhai and also pelted stones with a view to cause injuries to members of the otherside. It also appears that during the attack some persons from the side of the Yusufkhan Amirkhan armed themselves with sticks and koytas and they caused injuries to some of the accused. After the assault was over, all the accused ran away from the scene. As a result of this assault Abbaskhan and Haidarkhan lost their lies; whereas others got seriously wounded. Both these deceased persons happened to be the brother of Yusufkhan Amirkhan and uncle of Rabiyabibi.

4.2. It appears that the Sub-Division Police Officer, Surat Rural Division Jayshiv Jayantbhai Desai had gone to Ankleshwar from Bharuch alongwith his police party in connection with offence registered at C.R. No. 10/1990 at Mandavi Police Station u/S. 394 of the IPC and while he was returning from Ankleshwar to Surat in the afternoon and at about 2.00 O'clock, he was informed by one Rickshawvala near Kim cross road at about 4.15 p.m. that a serious trouble had taken place in village

Pipodara. He, therefore, went to Pipodara alongwith Circle Police Inspector Shri M.L. Parmar and the Sub Inspector of L.C.B. Shri G.R. Tiwari together with the police party. While he was on his way to Pipodara the S.D.P.O. also informed the Police Sub Inspector, Kosamba Police Station Shri Padariya on wireless about the incident and directed him to reach there immediately. When he reached Pipodara at the scene of offence, near Masjid Faliya, he saw that one person was already dead and one another was lying in very serious condition. He, therefore, instructed P.I. Shri Parmar to remove the injured to Government hospital in the staff jeep car. Accordingly Shri Parmar started with the inured in his jeep for the hospital. The S.D.P.O. continued to remain there. He instructed his staff members to find out whether there was any other person in injured condition requiring hospitalization. When Shri Padariya arrived he instructed him to record the first information and he also took steps to bring confidence amongst ladies and children, who were very scared and terrified. In the meanwhile Yusufkhan had gone to Mariyam hospital for taking treatment and from there to the Kosamba Police Station to give information regarding the incident. His information was reduced into writing by the concerned Police Officer and thereafter the usual investigation commenced.

4.3. In this incident over and above the death of two persons, several persons from the side of Yusufkhan received injuries, they were - Idrishbhai Abbaskhan, Liyakat Mahmad, Mahmad Abbasbhai and Yusufkhan Amirkhan. On the side of accused, accused no. 2 - Salimkhan Hamidkhan, accused no. 8 - Hamidkhan Gulamkhan, accused no. 7 Yusufkhan Gulamkhan and accused nos. 9 and 10 i.e. Salmabibi and Memunabibi respectively suffered injuries. The injured were treated at different hospitals and upon completion of the treatment they were discharged from the hospitals.

5. In pursuance to the complaint filed by Yusufkhan Amirkhan, P.S.I. Shri Padariya carried out the investigation into the matter after registering the offence at Kosamba Police Station against all the accused. During course of investigation he recorded statements of various persons conversant with the facts of the case, drew the relevant panchnamas such as inquest panchnama, panchnama of scene of offence, panchnama of recovery of weapons, etc., arrested all the accused, seized all the incriminating articles including the weapons used in commission of crime. At the end of the investigation, the I.O. filed chargesheet in the Court

of the concerned Ld. Magistrate, who in turn committed the case to the Court of Sessions, in view of the fact that several offences alleged against the accused were exclusively triable by the Court of Sessions.

6. It may be noted here that from the side of the accused also a criminal complaint came to be filed with Police Station at Palsana, district Surat against some of the persons on the side of Yusufkhan.

7. At the trial, the Ld. Judge framed charge at Exh.16 on 26th March 1991 for various offences such as u/Ss. 302, 307, 321, 324, etc. of the IPC and the same was read over to the accused, who denied the guilt and claimed to be tried.

8. The prosecution in support of its case not only examined eye witnesses, the Medical Officers, panchas, the police officers and other relevant witnesses. The Ld. trial Judge upon completion of recording of oral evidence put all the incriminating circumstances appearing in evidence against the accused while rendering their further statements u/S. 313 of the Cr.P.C. to enable them to render explanation, if they so desired. Their defence appears to be of general denial. However, in furtherance thereof, they also filed written statement at Exh. 120 dated 22/9/1992.

9. On conclusion of the trial, the Ld. Addl. Sessions Judge, in view of the findings given in the judgment, passed the orders of conviction and sentence, details of which have already been stated in the foregoing paragraphs. In light of these orders, the present appeals have been filed.

10. At the hearing of this group of appeals Mr. K.J. Shethna, Ld. counsel for the appellants in Criminal Appeal No. 401 of 1993 and respondents in rest of the appeals, has submitted that so far the conviction and order of sentence passed against the appellants of Criminal Appeal No. 401 of 1993 are concerned, they are erroneous in as much as the prosecution has not been able to prove its case against them beyond any reasonable doubt. He has further submitted that the prosecution has suppressed certain material facts as they have not explained the injuries suffered by the accused and on that count alone the convicted accused deserve to be acquitted. He has further submitted that the prosecution has not come out with the true version of the incident as they have deliberately kept mum as to how the incident had actually started. He has submitted that there is no

material on record to show that it was the accused who were the first assailants and, therefore, it is quite possible that there was a sudden fight in which both sides got injured and if that be so, the convicted accused can at the most, be held guilty of committing offence u/S. 304 Part-II of the IPC only and nothing more than that. He has further submitted that in view of the fact that there was sudden fight, all the individual accused are liable for their respective acts and they cannot be saddled with liability of committing offence by virtue of either section 34 or section 114 or sections 147, 148 and 149 of the IPC. Lastly, he has submitted that the Criminal Appeal No. 401 of 1993 filed by the appellants-accused be allowed and the other three appeals filed by the State be dismissed.

10.1. As against that, Mr. K.C. Shah, the Ld. APP for the State has submitted that the trial Court has not committed any error and hence there is no need for this Court to interfere with the appeal filed by the appellants. He has further submitted that looking to the evidence that has come on record, this Court is also required to take strict view on the question of sentence passed by the trial Court and has submitted that the said sentence is required to be enhanced being hopelessly inadequate. He has also submitted that the accused who were already acquitted by the trial Court are equally guilty of committing the main offences by virtue of they being members of the unlawful assembly and they are required to be convicted with the aid of sections 147, 148 and 149 of the IPC. In other words, he has submitted that all the aforesaid appeals filed by the State of Gujarat are required to be allowed.

11. The learned counsels have taken us through the entire record of the case and have placed reliance on oral as well as documentary evidence in support of their contentions. We have also minutely scrutinized the evidence on record with a view to reappreciate it afresh.

12. The prosecution in all has examined 27 witnesses to prove its case against the accused.

12.1. Out of 27 witnesses, there are 10 eye witnesses. Out of them some witnesses have even suffered injuries in the incident.

12.2. In order to prove that both the deceased had died homicidal death, the prosecution has placed reliance on medical evidence in the form of oral evidence of Dr. Virendrakumar Dhanajibhai P.W.9 Exh. 55 and Dr.

Hasmukhbhai Natvarbhai Naik P.W.10 Exh. 59. Dr. Virendrakumar has examined the dead body of Haidarbhai Amirkhan Pathan on 29/1/1990. At the relevant time he was discharging duties as Medical officer at Primary Health Centre, Kathor. According to him, on 28/1/1990 at about 7.45 p.m. dead body of Haidarbhai Amirbhai Pathan was received by him from the Dinbandhu Hospital, Kamrej. He had commenced the post mortem examination of the said dead body on 29/1/1990 at about 8.30 a.m. and completed the same at 9.30 a.m. He has also prepared post mortem notes recording his findings of the post mortem examination of the dead body. In column no. 17 of the post mortem notes, which have been produced on record at Exh. 56, it has been stated that the deceased had sustained following external injuries :-

(1) Sharp cutting wound on the right scapula in 'L' shape. Size 3 x 3 x 8 cm.
Right scapula is sharply cut out just below superior border 4 cm.

So far the internal injury is concerned, he has noted that the right pleura is torn in posterior part and the right lung is punctured and full with blood. In his opinion, the cause of death is shock due to severe hemorrhage due to injuries to right lung and these injuries were caused at about 12 to 18 hours before the post mortem examination.

In his evidence this witness has stated that these injuries could be caused by two edged sharp pointed weapon and in his opinion the injuries suffered by the deceased were sufficient in ordinary course of nature to cause death. In the cross-examination he has denied the suggestion of the defence that the injuries mentioned in column no. 17 of the post mortem notes could be caused by any sharp cutting instrument. He has reiterated that the said injuries could be caused only by two edged sharp pointed instrument. The defence has cross-examined this witness extensively. However, it has not been able to elicit any material which may of any help to it. The evidence of this witness, in our opinion, conclusively proves that the deceased Haidarbhai Amirkhan had died a homicidal death and the injuries received by him were sufficient in ordinary course of nature to cause death. It is also proved that the age of these injuries is about 12 to 18 hours prior to the post mortem examination. Over and above that, the prosecution has also placed reliance on the inquest report produced at Exh. 58 which is quite in consonance with the description of given injuries stated in the evidence of this witness.

12.3. The prosecution has examined Dr. Hasmukhbhai Natvarbhai P.W.10 Exh.59 who had performed the post mortem of Abbaskhan Amirkhan. At the time of incident, he was working as Medical Officer at Primary Health Centre, Kosamba. On 29/1/1990 at about 8.30 a.m. he received the dead body of Abbaskhan Amirkhan from the Police Sub Inspector, Kosamba Police Station. He commenced the post mortem examination of the dead body at about 8.45 a.m. and completed the same at about 10.45 a.m. He has recorded the findings of his post mortem examination in the post mortem notes which have been produced at Exh.60 on the record of the case. Column no. 17 of the post mortem notes describes the injuries sustained by the deceased. They are as follows :-

(1) Stab wound on Rt. side of abdomen 2" away from mid line in Rt. hypochondriac region of abdomen transversely situated 3 cms. x 1 cm. cavity deep. Clean cut edge.

(2) Red contusion on back of lower part of Lt. forearm 3" x 1" oblique.

(3) Colla's fracture on Lt. wrist with deformity.

(4) Stab wound on Rt. side of back 1.5" away from thoracic spins in 7th intercostal space. Transversely situated 4 cms x 1 cm. x cavity deep.

So far internal injuries are concerned, this witness has noted that right lung was congested and it contained blood. The right lung was also congested with penetrated wound on the upper side of lower lobon on back side 2 x 2.5 cms. deep with profused bleeding due to ruptured lung vessels. He has also found the left lung congested. These injuries were corelated to injury no. 4 of column no. 17. He has also found perforation on right side of peretorial, which could be corelated with external injury no. 1 shown in column no. 17. So far abdominal cavity is concerned, it contained about 150 grms of blood. The other vital organs like lever, intestine were also shrank and they were full with gaseous substance as well as excrete. In the opinion of this witness, the cause of death was due to severe internal haemorrhage due to injury to right lung and omentum caused by sharp pointing and cutting instrument and two shocks. He has stated that these injuries were sufficient in the ordinary course of nature to cause death and in his opinion, the deceased must have died within 18 to 24 hours prior to the post mortem examination. So far injuries nos. 1 and

4 of column no. 17 are concerned, he has opined that the same could be caused by sharp cutting instrument, whereas injuries nos. 2 and 3 could be caused by hard and blunt substance like stick and by fall respectively. Nothing of any importance has been brought out in the cross-examination by the defence. The evidence of this witness, therefore, conclusively proves that the deceased Abbaskhan Amirkhan has died homicidal death and that the injuries received by him were sufficient in the ordinary course of nature to cause death.

13. The evidence of aforesaid two Medical Officers is, therefore very clear on the aspect of the homicidal death of deceased Haidarkhan and Abbaskhan and in our opinion the trial Court has not committed any error in holding that both these persons have died homicidal death.

14. The next question that requires consideration is that whether all the accused or any of them are or is responsible for causing the death of these persons.

15. In support of its case, the prosecution has examined Idrishbhai Abbasbhai P.W.1 Exh. 39. According to this witness, on 28th January, 1990 in the morning at about 10.00 O'clock a marriage party had arrived in village Pipodara from village Siyalaj as the daughter of Yusufkhan Amirkhan, Rabiyabibi was to get married. At about 10.45 a.m. son of Sabbirbhai, namely, Gulambhai teased a young girl who had come there with the marriage party and that had caused some trouble which could be pacified with the intervention of deceased Haidarkhan and Abbaskhan. He has further stated that so far marriage was concerned, the ceremonies were performed in peaceful atmosphere and no untoward incident took place at that time. However, when the marriage party of the bridegroom was about to return with Rabiyabibi, a physical fight took place between the members of the marriage party and accused no. 7 - Yakub Gulam, accused no. 2 - Salimkhan Hamidkhan, accused no. 8 - Hamidkhan Gulamkhan and accused no. 10 - Memunabibi. This happened at about 3.15 p.m. At that time father of this witness Abbaskhan and his uncle Yusufkhan were standing under the Samiyana erected for the marriage purpose in front of the house of Yusufkhan and were making arrangements to return the articles and furnitures used for marriage ceremony. Shortly thereafter, while this witness was inside his house, he heard shouts "beat beat". When he came out of the house, he saw that accused no. 7 - Yakub Gulam was armed with stick, whereas accused no. 2 - Salimkhan was armed with a knife. They were accompanied by accused no.

1 Gulam Sardar, who was armed with koyta and accused no. 8 - Hamid Gulam armed with spear. He also saw accused no. 3 - Abdulsamad armed with flat iron rod. Alongwith them Ibrahim Sarthanwala was also there who carried an iron rod with him. These people were also accompanied by lady accused no. 6 - Nazmabibi, accused no. 9 Salmabibi, accused no. 5 - Madinabibi and accused no. 10 Memunabibi. On arriving at the scene of offence, accused no. 7 Yakub gave a blow on the left hand of Abbaskhan, father of the witness, with stick. Accused no. 2 - Salimkhan Hamidkhan gave knife blow on deceased Abbaskhan just below the chest and also delivered second blow on the back of Abbaskhan. The said accused thereafter caused injuries with knife to this witness after chasing him inside his house. Accused no. 2 Salimkhan also caused injuries to Liyakat Mahmad and Mahmad Abbas. So far accused no. 8 Hamidkhan was concerned, he gave a blow with spear on the back side of the body of Haidarkhan. As a result of assault on him, Abbaskhan fell down on the ground and became unconscious. This witness has further stated that so far lady accused were concerned, they pelted stones and not only that but they had also indulged into physical fight with some relatives of Yusufkhan. This witness was thereafter taken to Mariyam Hospital for treatment. He had to be hospitalised for a period of 23 days. At the trial he identified the accused as well as the weapons which were used by the assailants at the time of incident. In the cross-examination by the defence this witness has stated that there are houses of Hindus in that locality, but they are in the opposite direction facing and their back sides fell towards the scene of offence. He has further stated that he had not stated before the police that while the marriage procession was about to return, the accused persons went to the marriage party and started physical fight with them. He has further stated in the cross-examination that he had not stated any history of the incident to the Medical Officer. This witness has tried to assert that though he had seen the incident, he had not seen that accused no. 7 - Yakub, accused no. 8 Hamid, accused no. 2 - Salim and accused no. 10 Memuna had sustained injuries and some of the injuries were bleeding injuries. This witness has further stated that their houses have been situated in a close vicinity at the spot of the incident. He has admitted the fact that against his uncle Yusuf and Liyakat Sessions Case No. 7 of 1991 for offence u/S. 307 of the IPC was pending in the same Court. He has also stated in the cross-examination that when he learnt about the assault on members of the marriage party, he did not feel that he should have gone there for for their rescue. He has also

stated that when he saw the assault on marriage party, he did not see any weapon carried by any of the members of the marriage party. In unduly long cross-examination by the defence of this witness, nothing much has been brought out to discredit his evidence. It may be, however, stated here that defence has tried to confuse the witness by indulging into irrelevant and unduly long cross-examination, but he has withstood the same and has to a great extent supported the case of the prosecution.

15.1. Rajiyabanu Abbaskhan Pathan P.W. 2 Exh. 41 has stated that on 28th January, 1990 a marriage party had arrived from village Siyalaj to Pipodara and one Gulambhai had teased one young girl who had come with the marriage party. As a result thereof, initially there was some altercations, but thereafter the marriage ceremony could be performed in peace and in the afternoon when the marriage party had already left village Pipodara, her uncle Yusufkhan was making arrangements to return the articles used for the marriage and at time when she was about to go to her house, she saw accused no. 7 - Yakub Gulam, accused no. 8 - Hamid, accused no. 2 Salimkhan, accused no. 1 - Gulam, accused no. 3 Abdul Samad, accused no. 4 - Ibrahim and accused no. 5 Madinabibi, accused no. 6 - Nazmabibi, accused no. 9 Salmabibi and accused no. 10 - Memunabibi coming there and all of a sudden attacking Yusufkhan and others. Her father Abbaskhan was also at that place. There was a commotion and others came there and in the meanwhile accused no. 7 - Yakubgulam caused injury to Abbaskhan with stick. She, therefore, went to rescue her father, but accused no. 2 - Salimkhan threatened her that she should go away otherwise he would kill her. She has further stated that accused no. 2 - Salimkhan thereafter caused injuries with knife on Abbaskhan's chest and also on the back. She has further stated that accused no. 8 Hamidkhan gave a spear blow on the back of Haidarkhan. She has further stated that at that time accused nos. 5 Madinabibi, 6 Nazmabibi, 9 - Salmabibi and 10 Memunabibi caught her by hair and gave her kick and fist blows. She has further stated that accused no. 2 Salimkhan caused injuries to Liyakat and Idrishbhai with knife. At that time accused no. 3 - Abdul Samad and accused no. 4 Ibrahim were wielding iron rods. According to her, the cause of incident was the teasing of the girl as well as a dispute between her uncle Haidarkhan and the otherside in respect of Vada land (open land). She has further stated in the examination in chief that in this incident accused no.7Yakub, accused no. 2 Salim and accused no. 10 Memunabibi had also received injuries. In the cross-examination by the defence, she has stated that the

accused no. 7 Yakub, accused no. 8 - Hamid, accused no. 2 - Salim and accused no. 10 Memunabibi had received injuries in their fight with the marriage party in the afternoon and these injuries were not serious one. However, with a view to retaliate, the accused had turned their attack on Yusufkhan and others at about 4.00 O'clock. Again this witness has been unduly cross-examined at length, but nothing of any importance has been elicited by the defence. Her cross-examination, however, shows that in her evidence at some juncture she has made slight improvements and has deviated from her version given before the police, but the same is not of much significance and it certainly does not render her evidence doubtful.

15.2. Javedkhan Haidarkhan P.W. 3 Exh. 42 is also an eye witness and he has more or less deposed on the same line as has been done by the previous two witnesses. In the examination-in-chief he has stated that during the fight between the members of the marriage party and the accused, accused no. 7 - Yakub Gulam, accused no. 8 Hamidkhan, accused no. 9 - Salmabibi and accused no. 10 Memunabibi had received injuries. In the cross-examination he has admitted that in the police statement he had not stated that there was a physical fight between the members of the marriage party and the accused at about 3.15 p.m. in which the aforesaid accused had received injuries. He has further stated that during the assault at about 4.00 O'clock by the accused on Yusufkhan and others in the Samiyana, they felt that they would be killed by the assailants and, therefore, the witness and his other relatives procured some weapons from the houses and they started wielding the same in their defence. As a result, some of the accused persons had received injuries. According to him, the persons who had caused injuries to the accused were Gulam, Mehmood, Javed, Bashir and he himself.

15.3. Liyakatali Mahmad Shaikh P.W. 4 Exh. 43 is an eye witness, who has suffered injuries during the incident in question. He has reiterated the version given by the earlier witnesses and in addition thereto, he has stated that accused no. 3 - Abdul Samad had caused him injury on the back with a flat iron rod used as a spring in heavy vehicles. He has further stated that accused no. 4 - Ibrahim had caused him injury with iron rod on his head. In the examination-in-chief he has further stated that in this incident accused no. 7 Yakub Gulam, accused no. 8 Hamidkhan, accused no. 9 Salmabibi and accused no. 10 Memunabibi had also received injuries. In the cross-examination the witness has

stated that he was staying with deceased Haidarkhan. He has also stated in the cross-examination that the accused had filed Sessions case No. 4 of 1991 against them which was pending in the Court. So far injuries on the accused are concerned, the witness has tried to explain them by saying that during the incident at 4.00 O'clock they had felt that the assailants would kill Abbaskhan, Haidarkhan and others and, therefore, they picked up weapons like sticks, koytas and iron rods and started wielding. As a result of that, some of the accused persons had received injuries. He has denied that he had not stated before the police that accused no. 4 - Ibrahim had given him a blow with iron rod on his head. According to him, he had stated so before the police, but he did not know whether the police had recorded it or not.

15.4. There are other eye witnesses whose evidence is merely a repetition of what has been stated by the witnesses already discussed hereinabove. It is, therefore, not necessary to discuss their evidence in this judgment. However, the evidence of Yusufkhan Amirkhan P.W. 7 Exh. 47 is required to be considered as this person, who has lodged complaint with the police as well as at whose place the entire incident had occurred. He has stated that on 28th January, 1990 there was a marriage of his daughter Rabiyabibi and for that, a marriage party had come to village Pipodara from village Siyalaj. Around 3.15 in the afternoon after the marriage ceremony was over, the marriage party had departed with his daughter Rabiya and he was thereafter busy with sending back the furnitures and other articles lying in the Mandap. At that time, around 4.00 O'clock in the afternoon accused no. 8 - Hamidkhan, accused no. 1 Gulam, accused no. 2 Salimkhan, accused no. 3 - Abdul Samad, accused no. 4 Ibrahim, accused no. 5 Madinabibi, accused no. 6 Nazmabibi, accused no. 9 Salmabibi and accused no. 10 Memunabibi came there. Accused no. 7 Yakub Gulam was also with them. They were armed with deadly weapons. Immediately on arriving there accused no. 7 - Yakub gave a blow with stick on the left ear of the witness. The said accused gave another blow with stick on the left hand of Abbaskhan, the brother of the witness. According to him, accused no. 2 - Salimkhan gave a blow with knife on the chest of Abbaskhan and second blow on the back of Abbaskhan. Accused no. 8 Hamidkhan gave a blow with spear on the back of Haidarkhan. He has further stated that accused no. 3 Abdul Samad gave a blow with flat iron rod on the back of Liyakat and accused no. 4 Ibrahim gave a blow with the iron rod on the head of Liyakat. He has further stated that accused no. 1 Gulam Sardar was wielding koyta and

he was shouting that kill them. At that time accused no. 6 - Nazma, accused no. 9 Salma, accused no. 5 - Madina and accused no. 10 Memuna gave filthy abuses and they pelted stones. He has further stated that accused no. 2 Salimkhan caused knife injuries to Liyakat and also to Mahmad Abbas. He has further stated that to defend themselves during this incident, he asked some of the relatives to bring arms and to defend themselves. Accordingly some of his relatives went inside the houses and brought sticks and koytas and whatever other weapons that became handy and started defending themselves. As a result of this, the otherside received several injuries. According to this witness, the cause of the incident was the internal dispute with his uncle Yakub and his relatives with regard to a Vada land. However, a settlement was already arrived at between the parties in respect of dispute of Vada. He has further stated that the accused had physical fight with some of the members of the marriage party around 3.15 in the afternoon and in that also some of the accused persons had received injuries. He has stated that he had been to Kosamba Police Station for lodging complaint which was duly recorded by the police. The same is produced on record at Exh. 48. The defence has tried to dislodge this witness by a lengthy cross-examination, most of which is irrelevant and it has not succeeded in doing so. His evidence has, therefore, remained acceptable.

16. The oral evidence of aforesaid witnesses clearly shows that on the day of incident i.e. 28th January, 1990 a marriage party had arrived from village Siyalaj as daughter of the complainant Yusufkhan was to get married. It also appears that around 11.00 O'clock in the morning a youth named Gulam cut a vulgar joke in respect of a girl who had come alongwith the marriage party which had generated some bitterness amongst members of the marriage party, but they were pacified and the marriage ceremony was performed peacefully. At about 3.15 in the afternoon when the marriage party was about to leave, some untoward incident appears to have taken place between the accused on one side and the members of the marriage party on the other. It also appears that some of the accused were armed with weapons with the intention to beat some of the members of the marriage party in view of the incident that had taken place in the morning. It also appears that the marriage party, however, managed to leave the village within short time of this incident. In the meanwhile some of the accused persons seem to have received injuries. We may, however, say that so far the injuries on the persons of the accused are concerned, there is no satisfactory evidence on record to show as to

whether the accused received injuries during this scuffle with the marriage party or during the incident which took place later on wherein two deaths were caused and several persons came to be injured. In light of this shaky evidence on this aspect, it is not possible to hold by us that the accused had received injuries only in their fight with members of the marriage party. The possibility of accused having receied the injuries during the incident of 4.00 O'clock when some of the relatives of complainant Yusufkhan secured weapons from their respective houses with a view to defend themselves cannot be ruled out. If the entire evidence is considered carefully, there is no manner of doubt that the accused had already armed themselves with a view to teach some lesson to the members of the marriage party and with that purpose they had gone near the house of Yusufkhan from where the marriage party was to leave at about 3.15 p.m. Thereafter they had a scuffle with some of the members of the marriage party. It is, therefore, not difficult to infer that on seeing the assault on the marriage party, Yusufkhan and others might have rushed there with a view to save the members of the marriage party and on seeing them the accused seem to have turned their entire attention and attack on Yusufkhan and others. Taking this opportunity the marriage party seems to have left the place without getting into more serious trouble. What ensued thereafter was free fight. In this fight unfortunately two persons of the side of complainant lost their lives and several persons came to be injured. As against that, some persons on the side of the accused also sustained injuries. In this state of evidence it is difficult to see that the accused had formed themselves into unlawful assembly from the very beginning with a common object to commit murder of Yusufkhan and his relatives and in furtherance of that common object, they had arrived at the scene of offence at 4.00 O'clock and indiscriminately assaulted the complainant and his relatives. The accused, therefore, cannot be held guilty of committing offence made punishable u/Ss. 147, 148 and 149 of the IPC. However, looking to the nature of the entire incident, each of the accused can be held liable for committing his own act, if found guilty for the same.

17. So far the injuries to deceased Abbaskhan is concerned, it has been caused by accused no. 2 Salimkhan Hamidkhan. The prosecution evidence is very clear on the part played by this accused. They have unequivocally said that this accused had assaulted deceased Abbaskhan with knife and had caused him one injury on the chest, whereas the other on the back. Since the medical evidence on record clearly shows that these injuries were

there and they caused death of Abbaskhan, the oral evidence of prosecution witnesses gets ample support from the medical evidence. That leaves no manner of doubt that accused no. 2 - Salimkhan is responsible for causing death of Abbaskhan. The question, therefore, now requires consideration whether in such free fight this accused is entitled to receive benefit of any of the exceptions to section 300 of the IPC. Exception IV to section 300 states that culpable homicide is not murder, if it is committed without premeditation in a sudden fight, in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel and unusual manner. The evidence on record shows that Abbaskhan was aged person and at the time of assault on him, he was totally unarmed. It also shows that taking the disadvantage of the situation accused no. 2 Salimkhan had delivered two fatal blows on his body, which had resulted into his almost instantaneous death. Coupled with the fact that this accused had also caused injuries to other prosecution witnesses and so far Idrishbhai is concerned, he had even chased him inside his house and caused him injuries with knife. In light of this, by no stretch of imagination it can be said that this accused had not acted in a cruel or unusual manner or that he had not taken undue advantage of the situation. His act, therefore, cannot be covered under exception IV to section 300 of the IPC. He, therefore, cannot be convicted for any lesser offence than an offence u/S. 302 of the IPC. To that extent, we are agreeable with the finding given by the trial Court and we hold that accused no. 2 - Salimkhan Hamidkhan Pathan is guilty of committing offence made punishable u/S. 302 of the IPC.

17.1. Again the prosecution evidence clearly shows that this accused i.e. Salimkhan had caused injuries with knife to prosecution witnesses Idrishbhai, Liyakat Mahmad and Mahmad Abbas. The medical evidence also supports this say of the prosecution witnesses. Dr. Philip has produced medical certificate at Exh. 96, which shows that Mahmad Abbas Shaikh was treated as an outdoor patient on 29th January, 1990. He had one stab wound over left tempo parietal region. Moreover, he has also produced medical certificate at Exh. 97 pertaining to injuries suffered by Liyakat Mahmad, which shows that he had suffered incised wound on right shoulder and a small cut on the scalp near left ear. So far injured prosecution witnesses Idrishbhai is concerned, Dr. Devendra C. Mahadik states that he had suffered as many as three external injuries which corresponded to three internal injuries described in his evidence at serial

nos. 1 to 6. In his opinion, these injuries were caused by sharp cutting instrument like Rampuri knife. Since these injuries are of serious nature and likely to endanger human life, the author of the same can be held guilty of committing an offence u/S. 326 of the IPC. In view of the aforesaid evidence, oral as well as medical, we hold that accused no. 2 Salimkhan Hamidkhan is also guilty of committing offence u/S. 326 of the IPC for causing injuries to Idrishbhai and u/S. 324 of the IPC for causing injuries to Liyakat and Mahmad as stated above.

17.2. So far the other deceased, namely Haidarkhan is concerned, he has been assaulted by accused no. 8 Hamidkhan Gulamkhan Pathan. Considering the evidence on record, he also can be found guilty of committing offence u/S. 302 of the IPC. However, since during the pendency of his appeal before this Court, he has expired as stated above, we do not think it fit to discuss the role played by him in this incident with a view to decide what offence he had committed. That leaves us to determine the individual part played by other accused.

17.3. As stated above, accused no. 1 - Gulam Sardar Pathan has expired during the pendency of the present appeals and hence there is no need to discuss the role played by him in this incident.

17.4. So far accused no. 3 - Abdul Samad is concerned, it is the case of the prosecution that at the time of incident he had armed himself with a flat iron rod meant to be used as a spring in the heavy vehicles like truck. He had used the iron rod in causing injury to prosecution witness Liyakat on his back. The evidence of Liyakatali Mahmad Shaikh P.W.4 Exh. 43, Gulam Habib Shaikh P.W. 5 Exh. 45 and Yusufkhan Amirkhan P.W.7 Exh. 47 clearly shows that this accused had assaulted Liyakatali and had given him a blow with flat iron rod on his back. Their evidence is duly supported by medical evidence. Evidence of Dr. M.K.P. Philip P.W.24 Exh. 95 shows that he was working as Director of Medical in Mission Hospital at Surat. From April 1991 to June 1991 he was working as Medical Director, Dinbandhu Hospital. During his examination in the Court he had brought two certificates, namely mark 38/16 which was signed by Dr. Mistry and mark 38/17 signed by Dr. Raju and he had identified the said documents in the Court as being the medical certificates pertaining to the injuries sustained by prosecution witnesses Mahmad Abbas Shaikh and Liyakatali Mahmad Pathan. They have been duly exhibited as Exhs. 96 and 97 respectively. Exh. 97 pertains to the injury

suffered by Liyakat Mahmad. It shows that Liyakat had suffered knife injury on the right shoulder and also injury on the upper part of both right side and left side and on the scalp. He has also suffered a small cut on the left ear. This certificate therefore, corroborates the evidence of the prosecution witnesses to the effect that he was assaulted by accused no. 2 - Salimkhan with knife and also by accused no. 3 - Abdul Samad with flat iron rod. However, it also appears from the certificate that he was hospitalised on 28/1/1990 at 6.00 p.m. and was discharged on 29/1/1990. The injuries suffered by him, therefore, do not appear to be of serious nature. In that view of the matter, accused no. 3 - Abdul Samad can be held guilty of committing offence u/S. 324 of the IPC, for causing simple injuries with a dangerous weapon. In light of this finding, in our opinion, the finding given by the Ld. trial Judge holding him guilty of offences u/S. 302 and section 302 read with section 149 of the IPC and certain other offences mentioned above, is erroneous. This accused can at the most be convicted for offence u/S. 324 of the IPC alone.

17.5. So far accused no. 4 - Ibrahim Husain is concerned, there is no need to discuss his role in this judgment, as he had died during pendency of the trial and trial against him had already abated.

17.6. So far accused no. 7 - Yakub Gulamkhan Pathan is concerned, it is clear from the oral as well as medical evidence on record that he had caused injuries with stick to deceased Abbaskhan on left hand and also to prosecution witness Idrishbhai Abbaskhan. The post mortem notes of deceased Abbaskhan Hamirbhai and in particular item nos. 2 and 3 of column no. 17 thereof, show that he had suffered injury on the left forearm 3" x 1" oblique and a collective fracture of left wrist. Since he had used stick, which can be termed as a dangerous weapon, at the time of incident, he can be held guilty of causing grievous hurt by dangerous weapon to Abbaskhan and, therefore, he can safely be held guilty of committing offence u/S. 326 of the IPC. Moreover, Dr. Devendra C. Mahadik P.W.22 Exh. 89 is examined by the prosecution to prove the injuries suffered by prosecution witness Idrish. In his evidence this witness has stated that Idrishbhai had suffered six injuries, out of which injury no. 2 was a fracture of 10th rib. However, in the cross-examination he has admitted that this fracture could be related to injury no. 1 which was caused by sharp cutting instrument. There is nothing in the evidence of this witness to show that Idrishbhai had suffered any injury which could be caused by a hard and

blunt substance like stick which is alleged to have been used by accused no. 7 - Yakub Gulamkhan. To that extent the evidence of prosecution witnesses is not supported by medical evidence. We are, therefore, unable to hold that the prosecution had conclusively proved that accused no. 7 - Yakub Gulamkhan had caused injury to prosecution witness Idrish by means of stick.

17.7. Further the evidence of P.W.5 Gulam Habib Shaikh as well as that of Mahmad Abbas Shaikh P.W.6 Exh.46 and Yusufkhan Amirkhan P.W. 7 Exh. 47 shows that accused no. 7 - Yakub Gulamkhan had also given a stick blow to Yusufkhan Amirkhan near the left ear. It also appears from the record that after the incident he had gone to the Mariyam hospital for taking treatment. It also appears from the evidence that thereafter he had gone to Kosamba Police Station and had lodged the first information report regarding this incident and thereafter he had returned to village Pipodara. In view thereof, it may be possible that he might have suffered some injuries, may be of simple nature, during this incident. But in absence of any medical evidence, it will not be proper for us to give a final finding on that count. In sum and substance, so far accused no. 7 - Yakub Gulamkhan is concerned, the prosecution has been able to prove that he had caused injuries to deceased Abbaskhan, but it has not been able to prove the fact that he had also caused injuries to prosecution witnesses Idrish and Yusufkhan.

17.8. So far accused no. 5 - Madina, accused no. 6 Nazma, accused no. 7 - Salma and accused no. 10 Memunabibi are concerned, the prosecution has hopelessly failed to prove that they had in any manner participated in the actual incident. In absence of any reliable evidence on record with regard to their participation in the incident, we are unable to hold them guilty of any of the offences with which they were charged. The allegation against them was that they had assaulted Rajiyabibi by catching hold of her hair and by giving her kick and fist blows and they had also pelted stones at various members of the complainant's party. There is no medical evidence to support this version nor there is any indication in the Panchnama of scene of offence regarding stone throwing. Thus, neither of these allegations has been proved by the prosecution and we, therefore, agree with the findings given by the Ld. trial Judge acquitting them of all the offences. During the hearing of this appeal the Ld. APP Mr. Shah has also not been able to point out from the evidence any material which would go to show that they were active participants in

the incident and had committed any overt act during the course of entire incident. They therefore, deserve to have an order of acquittal in their favour.

18. In light of the aforesaid discussions, we set aside the conviction of the appellants of Criminal Appeal No. 401 of 1993 u/S. 302 read with section 149 of the IPC, u/S. 307 and section 307 read with section 149 of the IPC, u/S. 324 read with section 149 of the IPC, u/S. 323 read with section 149 of the IPC and u/Ss. 143, 147, 148 and 149 of the IPC. Instead accused no. 2 i.e. appellant no. 1 of Criminal Appeal No. 401 of 1993 Salimkhan Hamidkhan Pathan is convicted for an offence u/S. 302 of the IPC and he is sentenced to suffer RI for life. He is also convicted for offence u/S. 326 of the IPC and sentenced to suffer RI for 3 years and to pay a fine of Rs.2,000/-, in default to suffer further RI for six months. He is further convicted for offence u/S. 324 of the IPC and is sentenced to suffer RI for one year and to pay a fine of Rs.2,000/-, in default further RI for two months. It is directed that all the substantive sentences passed against him to run concurrently.

18.1. So far accused no. 3 i.e. appellant no. 2 of Criminal Appeal No. 401 of 1993 - Abdul Samad Mohammed Mirza is concerned, we convict him for the offence punishable u/S. 324 of the IPC and sentence him to suffer RI for one year and to pay fine of Rs.2,000/-, in default to suffer further RI for two months.

18.2. So far accused no. 7 - Yakub Gulamkhan Pathan, who is appellant no. 3 of Criminal Appeal No. 401 of 1993 is concerned, he is convicted for offence punishable u/S. 326 of the IPC and he is sentenced to suffer imprisonment for three years and to pay fine of Rs.2,000/-, in default to suffer further RI for six months.

18.3. Appellant no. 4 of Criminal Appeal No. 401 of 1993, who is accused no. 8 - Hamidkhan Gulamkhan Pathan has died during pendency of the appeal and his appeal therefore stands abated.

In view of the above, the Criminal Appeal No. 401 of 1993 is partly allowed.

18.4. As can be seen from the jail record of accused no.3 i.e. appellant no. 2 of Criminal Appeal No. 401 of 1993 - Abdul Samad Mohmmed Mirza that he has already undergone actual sentence of imprisonment for 5 years, 7 months and 13 days as on 24/1/2002. In view thereof, we

direct the prison authority to set him at liberty forthwith unless he is required for any other purpose.

18.5. Similarly accused no. 7 i.e. appellant no. 3 of Criminal Appeal No. 401 of 1993 Yakub Gulam Pathan has undergone actual imprisonment for 4 years, 8 months and 12 days as on 24/1/2002. He is also required to be immediately released from the jail. We, therefore, direct the prison authority to set him at liberty forthwith unless his presence is required for any other purpose.

18.6. So far Criminal Appeals Nos. 391 of 1993 and 392 of 1993 are concerned, in view of our findings given in connection with Criminal Appeal No. 401 of 1993, they do not have any merit and they are hereby dismissed. To that extent we confirm the judgment and order of acquittal passed by the Ld. trial Court. The bail bonds executed by the respondents of Criminal Appeals Nos. 391/1993 and 392/1993, if any, stand cancelled.

18.7. So far Criminal Appeal No. 396 of 1993 filed by the State of Gujarat for enhancement of sentence is concerned, the Ld. APP for the State has urged before us that looking to the gravity of the offence, the sentence of life imprisonment is required to be enhanced. However, we see no reason to agree with his contention in asmuch as we have already given finding to the effect that there is no case made out u/Ss. 147, 148 and 149 of the IPC and that this was a case of free fight in which the accused had been held responsible for their own acts. There is no unusual feature in this case which may prompt us to award capital punishment to the offender guilty of committing offence u/S. 302 of the IPC. Moreover, 11 years have already passed since the date of offence and at such a belated stage, it will not be proper for us to enhance the sentence. In the circumstances, we do not see any merit in this appeal and it therefore, deserves to be dismissed. Hence Criminal Appeal No. 396 of 1993 is hereby ordered to be dismissed.

[K.R. Vyas, J.]

[Akshay H. Mehta, J.]

* Pansala.